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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON
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8 DAWIT HABTEGIORGIS,

9 Plaintiff,

10 v.

11 OIC OF WASHINGTON,

12 Defendant.
13

NO: CV- 08-3077- RMP

ORDER MEMORIALIZING
COURT'S ORAL RULINGS

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15 A telephonic motion hearing was held May 28, 2010. Aaron Winkelhake
16 represented Plaintiff Habtegiorgis; Daniel Case represented Defendant OIC of
17 Washington. The Court addressed Plaintiff's Motion to Compel and For Sanctions
18 (Ct. Rec. 98), Plaintiff's Motion to Continue Trial and Modify Case Schedule (Ct.
19 Rec. 113), and Defendant's Motion for Reconsideration (Ct. Rec. 82). The Motion
20 to Continue was heard on an expedited basis (Ct. Rec. 110).
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23 The Court has reviewed the pending motions and supporting documents (Ct.
24 Rec. 100, 101, 102, 119, 120 121; Ct. Rec. 115, 116, 117; Ct. Rec. 112; Ct. Rec. 84
25 and 93, respectively), the remainder of the file, heard from counsel and is fully
26 informed. This Order is entered to memorialize and supplement the oral rulings of
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28 ORDER MEMORIALIZING COURT'S ORAL RULINGS ~ 1

1 the Court. The Court will address the discovery dispute issues and motions in the
2 order that they were argued.

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4 **A. Plaintiff's Motion to Compel and for Sanctions, Ct. Rec. 98**

5 Plaintiff moves the Court to order Defendant to comply with the Court's
6 previous order, Ct. Rec. 81, and comply with Plaintiff's outstanding discovery
7 requests. Plaintiff seeks sanctions pursuant to Fed. R. Civ. P 37 for costs in
8 bringing this motion.
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10 Under Federal Rule of Civil Procedure 26(b)(1), information is discoverable
11 if it is "relevant to the claim or defense of any party." Fed. R. Civ. P. 26(b)(1).
12

13 Relevant information need not be admissible if it is "reasonably calculated to lead
14 to the discovery of admissible evidence." *Id.* "Pretrial discovery is normally to be
15 accorded a broad and liberal treatment." *Herbert v. Lando*, 441 U.S. 153, 183
16 (1979). According to *Federal Practice*,
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19 [a] trial court has *considerable discretion* in determining relevance for
20 the purposes of discovery. If the court is uncertain as to the relevance
21 of a discovery request, a response is generally ordered since it may be
22 difficult to determine from the pleadings all of the issues which will
23 be developed at trial, and if the discovered matter is offered at trial, an
objection may be raised at that time.

24 § 24.07 (3rd ed. 1995)(emphasis added).
25

26 Similarly, a motion to compel discovery also may be granted if the
27 information sought is relevant or reasonably calculated to lead to the discovery of
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1 relevant information. *Reygo Pacific Corp. v Johnson Pump Co.*, 680 F.2d 643 (9th
2 Cir. 1982). The trial court's consideration of these motions is discretionary. *Id.*
3 Failure to make disclosures or to cooperate in discovery is governed by Fed. R.
4 Civ. Pr. 37. The rule states in part:
5

6 (a) Motion for an Order Compelling Disclosure or Discovery.

7 (1) *In General*. On notice to other parties and all affected persons, a party
8 may move for an order compelling disclosure or discovery. The motion
9 must include a certification that the movant has in good faith conferred or
10 attempted to confer with the person or party failing to make disclosure or
discovery in an effort to obtain it without court action.

11 *Id.*

12 The Court finds that Plaintiff has submitted sufficient evidence to support
13 that there have been good faith attempts to confer and attempt to resolve the
14 discovery disputes (Ct. Rec. 101 at 15). Plaintiff's requests are discussed as
15 follows:
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18 **a. The Network**

19 Plaintiff alleges that Defendant has not complied with the
20 Court's Order (Ct. Rec. 81) in allowing Plaintiff access to Defendant's relevant
21 network information and files stored on Defendant's network server. The Court
22 finds that Plaintiff's request is "reasonably calculated to lead to the discovery of
23 admissible evidence," but also is cognizant of Defendant's reluctance to give
24 Plaintiff full access to Defendant's computer network. Fed. R. Civ. P. 26(b)(1).
25 Therefore, the Court orders that by June 11, 2010, Defendant shall download onto
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1 portable disk(s) to be given to Plaintiff's counsel, all of the Microsoft Outlook files
2 now stored on Defendant's "H drive" or Defendant's server, including files related
3 to emails, calendars, and Outlook notes, for the following users:
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- 5 1. Mr. Walter Miller
- 6 2. Mr. Mulugeta Beyene
- 7 3. Ms. Charlene Parks
- 8 4. Ms. Deidre Dennis
- 9 5. Mr. Henry Beauchamp

10 **b.** By June 11, 2010, Plaintiff will be allowed to execute up to ten
11 searches using Plaintiff's choice of search, terms, or phrases on Defendant's
12 existing server and network, with Defendant's representative present, or else
13 Defendant's employee will execute Plaintiff's ten requested searches on
14 Defendant's existing server with Plaintiff and Plaintiff's counsel present. The
15 results of those searches will be provided immediately to Plaintiff's counsel, after
16 Defendant confirms that no confidential information, such as clients' social
17 security numbers, are included.
18

19 **c.** By June 11, 2010, Defendant will allow Plaintiff and Plaintiff's
20 counsel to examine the topography of the current network and server with one of
21 Defendant's employees present, and if there are any logs available that have
22 tracked the network's "health," those logs will be provided to Plaintiff and
23 Plaintiff's counsel for the period from 2000 through 2007.
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1 d. By June 11, 2010, Defendant will provide to Plaintiff's counsel, a
2 sworn affidavit by an OIC employee with knowledge, such as Larry Zable,
3 regarding the dates on which the old server became inoperable and the new server
4 was implemented.
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6 **2. Computers**
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8 a. By June 11, 2010, Defendant will provide to Plaintiff's counsel a
9 sworn affidavit by an OIC employee with knowledge, such as Larry Zable,
10 regarding whether back up disks had been made of Mr. Beauchamp's computer
11 and on what date Mr. Beauchamp's computer was reformatted. If backup disks
12 were made of Mr. Beauchamp's computer, those backup disks will be made
13 available to Plaintiff's counsel.
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16 b. By June 11, 2010, Defendant will provide to Plaintiff's counsel a
17 sworn affidavit by an OIC employee with knowledge, such as Larry Zable,
18 regarding whether all of Mr. Beauchamp's files were transferred to Ms. Dennis'
19 desktop hard drive, and if so, on what date that transfer occurred. Plaintiff's
20 counsel will be given access to Ms. Dennis' desktop hard drive, if that access
21 already has not been provided.
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24 c. By June 11, 2010, Defendant will provide to Plaintiff's counsel a
25 sworn affidavit by Ms. Dennis regarding whether she searched Beauchamp's
26 computer, prior to its being reformatted, or searched Mr. Beauchamp's files
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1 transferred onto her computer for any references to Mr. Habtegiorgis and, if so, on
2 what dates she searched for those files and whether any files were found.

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4 **3. Mr. Beauchamp Deposition**

5 a. By June 11, 2010, Defendant will provide the Court, for *in camera*
6 review, a copy of the letter from Mr. Beauchamp's doctor regarding whether Mr.
7 Beauchamp is capable of being deposed. Defendant will mail a copy of the letter
8 to the Court's address:

9
10 The Honorable Rosanna Malouf Peterson
11 PO Box 324
12 Spokane, WA 99210-0324

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14 **4. Six Outstanding Interrogatories, Hardware Lists and Software Lists**

15 a. Outstanding Interrogatories:

16 By June 11, 2010, Defendant will serve Plaintiff with answers to the first six
17 interrogatories of Plaintiff's second set of interrogatories, which Defendants
18 previously had been ordered to provide and which Defendants previously agreed to
19 provide (Ct. Rec. 81 at 7). Defendant's answers shall comply in all respects with
20 Fed. R. Civ. P. 33, including being "in writing under oath" and signed. *See* Fed. R.
21 Civ. P. 33.
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1 **b. Hardware Lists:**

2 By June 11, 2010, Defendants will provide Plaintiff with a copy of the SQL
3 database of the OIC hardware inventory, referenced by Larry Zable in Ct Rec. 121-1.
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5 **c. Software Lists**

6 During oral argument, Defendant informed the Court that it was
7 withdrawing any affirmative defense based on after acquired evidence alleging that
8 Plaintiff used unlicensed software. Therefore, Plaintiff's request for information
9 about Defendant's software licenses is denied as moot.
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12 **5. Backup Disks**

13 By June 11, 2010, Defendant will provide to Plaintiff's counsel a sworn
14 affidavit by an OIC employee with knowledge, such as Larry Zable, regarding
15 whether any back up disks were made from the computer hard drives of the
16 following former employees: Mr. Steve Mitchell, Mr. Duane Harris, Mr. Don
17 Mayo, Ms. Dwana Watley, and Ms. Jennifer Gray. If any backup disks were made
18 of those users' hard drives, the backup disks also are to be provided to Plaintiff's
19 counsel.
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23 **6. Inventory Audits**

24 By June 11, 2010, Defendant will provide to Plaintiff's counsel
25 "documentation that Defendant was required to perform inventory audits during
26 April of 2005" as previously ordered by the Court (Ct. Rec. 81 at 7). In the
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1 alternative, the Court requires a sworn statement by an OIC employee with
2 knowledge that no such evidence exists. Failure to provide this documentation or
3 sworn statement by June 11, 2010, will result in a \$50 per day sanction against
4 Defendant.

6 **7. Sanctions**

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8 Plaintiff's Motion to Compel and for Sanctions, Ct. Rec. 98, is granted.
9 Plaintiff shall submit a cost bill for bringing this motion. Discovery is re-opened
10 for the limited purpose of the outstanding discovery related to Plaintiff's Motion to
11 Compel.
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13 **8. Motion to Continue Trial Date and Modify Case Schedule**

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15 Plaintiff's Motion for Continuance of the Trial Date, Ct. Rec. 113, is
16 GRANTED. An Amended Scheduling Order is forthcoming.
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18 **9. Motion for Reconsideration**

19 Defendant's Motion for Reconsideration, Ct. Rec. 82, is GRANTED IN
20 PART. All conditions of the previous Order, Ct. Rec. 81, remain intact with only
21 the following modification: Plaintiff will file a notice with the Court if the total
22 cost of data recovery reaches \$50,000. If data recovery costs exceed \$50,000, the
23 Court may reconsider the cost shifting apportionment for any costs incurred
24 thereafter. Accordingly,
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1 **IT IS HEREBY ORDERED:**

- 2 1. Plaintiff's Motion to Compel and For Sanctions (**Ct. Rec. 98**), is
- 3 **GRANTED IN PART**, as defined in this Order. Plaintiff shall submit a bill
- 4 of costs to the Court.
- 5
- 6 2. Plaintiff's Motion to Continue Trial and Modify Case Schedule (**Ct. Rec.**
- 7 **113**), is **GRANTED**. Plaintiff's Motion to Expedite the above Motion (**Ct.**
- 8 **Rec. 110**), is **GRANTED**. An Amended Scheduling Order is forthcoming.
- 9
- 10 3. Defendants Motion for Reconsideration (**Ct. Rec. 82**), is **GRANTED IN**
- 11 **PART**, as defined in this Order.
- 12
- 13 4. All deadlines for Defendant are June 11, 2010 unless otherwise noted.
- 14
- 15 5. Defendant's Motion for Summary Judgment (**Ct. Rec. 85**) is **DENIED**
- 16 **WITH RIGHT TO RENEW OR REFILE** as discovery has been
- 17 reopened.
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19 **DATED** this 1st day of June, 2010.

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21 

22 s/ Rosanna Malouf Peterson

23 ROSANNA MALOUF PETERSON

24 United States District Court Judge

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